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Supreme Court, U.S.
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No. 10-1100

In the Supreme Court of the United States

JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.

Petitioners

v.

KAMEHAMEHA SCHOOLS/ BERNICE PAUAHI BISHOP ESTATE, ET AL.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Respondents proudly admit that they operate a system of racially segregated private schools. Petitioners are four children who challenged respondents' racially exclusionary admission policy as a violation of 42 U.S.C. § 1981, the Nation's oldest civil rights law.

Although petitioners willingly revealed their identities to respondents under a protective order entered by the district court, petitioners otherwise sought to shield their identities from the public by litigating this action using pseudonyms. The court of appeals

> —acknowledged that individuals who challenge respondents' locally popular admissions policy face "undoubtedly severe" threats of *physical* retaliation;
>
> —found that any prejudice to respondents from permitting petitioners to use pseudonyms here was "minimal" or "doubt[ful]"; and
>
> —concluded that permitting petitioners "to use pseudonyms [would] serve the public's interest in this lawsuit by enabling it to go forward."

The court of appeals nevertheless affirmed the district court's refusal to allow petitioners to use pseudonyms and its consequent dismissal of petitioners' claims with prejudice.

The question presented is whether the decision of the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by [the district] court, as to call for an exercise of this Court's supervisory power." Rule 10(a).

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REPLY BRIEF FOR THE PETITIONERS

Petitioners Jacob and Janet Doe, Karl Doe, and Lisa Doe respectfully file this reply brief in support of their petition for a writ of certiorari.

ARGUMENT

Respondents contend that the petition does not invoke any recognized basis for jurisdiction on certiorari, that the Court should not exercise its supervisory power over the Ninth Circuit even if there is certiorari jurisdiction, and that the decision below is not really as bad as it appears. We address these contentions in turn.

I. This Case Directly Implicates the Court's Supervisory Power.

Far from "[c]onceding that they lack any standard basis to seek a writ of certiorari" (Opp. 14), petitioners in fact rely on the final clause of this Court's Rule 10(a), which encompasses lower-court decisions that "call for an exercise of this Court's supervisory power." *See, e.g.*, Pet. i (final paragraph). Respondents assert that this expressly recognized basis for obtaining review "has no applicability in this case, where the question presented does not relate to the operation of the federal judiciary." Opp. 14. Respondents' assertion is easily refuted.

Though necessarily bound up in a concrete dispute (as is every true "Case" or "Controversy" within the cognizance of Article III of the Constitution), the petition essentially asks the Court to clarify the circumstances in which a person may properly seek redress in federal court while using a pseudonym. In so asking, the petition doubtless implicates the "operation" of the federal judicial system. In other words, like *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010), and *Nguyen v. United*

States, 539 U.S. 69, 81 (2003), this case "involve[s] a procedural or operational issue as to how the federal courts are run" (Opp. 15), namely, the use of pseudonyms by litigants in those courts. Indeed, respondents acknowledge that the case presents a dispute "regarding rules of civil procedure for litigants." Opp. 16.

Respondents label this case "a straightforward dispute over the application of Ninth Circuit precedent." Opp. 15-16; *see also, e.g.*, Opp. 13 (asserting that "this case involves merely the standard application of well-settled circuit precedent"). In this regard, respondents apparently intend to invoke Rule 10's admonition that certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." But the petition clearly does not concede that any Ninth Circuit precedent "properly state[s]" the applicable law. To the contrary, the petition argues that the Ninth Circuit *mis*stated the law in two respects: it "overvalued what it called the public's generalized right to 'open courts,'" and it "undervalued both the privacy and security concerns embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 15-16.

It is undeniable that "procedural questions of judicial administration" (Opp. 13) are involved in this case and are presented by the petition for certiorari. Therefore, the case implicates the Court's supervisory power over the lower federal courts and, in consequence, the petition properly invokes the final clause of Rule 10(a).

II. Exercise of the Court's Supervisory Power Is Warranted.

As noted above, respondents treat this case as if it were governed by "settled circuit precedent," the application of which the petition merely seeks a "do over" in

this Court. Opp. 17. Not so. Whether or not the Ninth Circuit was faithful to its own precedent, the decision below was not faithful to the accepted and usual course of judicial proceedings or to sound judicial practice. In the following two sections, we revisit this infidelity as it relates to "openness" and to Federal Rule 5.2(a).

A. Openness

In discussing what the Ninth Circuit labeled "the public's right to open courts" (Pet. App. 11a), respondents begin with Federal Rule of Civil Procedure 10(a), which provides that "[t]he title of the complaint must name all the parties." Pet. 2. Citing this "seemingly pedestrian" requirement, *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 188 (2d Cir. 2008), the courts of appeals have bolstered what respondents call "the public interest in open judicial proceedings." Opp. 18 (section heading); *see also* Opp. 18-19 (discussing cases). Petitioners do not quarrel with these decisions, nor would petitioners leave the impression that they denigrate openness in judicial proceedings. To the contrary: the fact that "[f]or many centuries, both civil and criminal trials have traditionally been open to the public, *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979), *quoted in* Opp. 19, is a facet of our judicial heritage to be admired and encouraged.

But the question here is not whether this openness is generally desirable or valuable, but whether it is (as the Ninth Circuit held below) a "paramount" consideration against permitting pseudonyms. Pet. App. 18a. The above-quoted decision of this Court in *Gannett Co.* is instructive in this regard. Even as it acknowledged the long history of open trials, and even as it took pains not to "disparage the general desirability of open judicial

proceedings," the Court nonetheless affirmed the fact-specific closure of a particular pretrial proceeding. 443 U.S. at 393-94. Likewise instructive is Judge Posner's opinion in *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869 (7th Cir. 1997). Respondents emphasize his statement that the "people have a right to know who is using their courts." *Id.* at 872, *quoted in* Opp. 18. But respondents ignore his immediately following statement: "There are exceptions"; indeed, "fictitious names are allowed when necessary to protect the privacy of children . . . and other particularly vulnerable parties or witnesses." 112 F.3d at 872; *see also id.* (acknowledging with approval the fact that the "plaintiff is proceeding under a fictitious name" after having been granted leave to do so by the district court).[1]

In the end, the decisions citing Federal Rule 10(a) go no further than the authorities cited by the court of appeals, i.e., they establish a "generalized"—and more importantly—a "non-absolute" right to openness. *See* Pet. 17. Therefore, elevating this right to a *paramount* consideration against using pseudonyms finds no warrant in Federal Rule 10(a). To the contrary, the decisions discussed above show this sort of elevation to be a departure from the accepted and usual course of judicial proceedings.

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[1] Respondents' treatment of the Fifth Circuit's decision in *Doe v. Stegall*, 653 F.2d 180 (5th Cir. Unit A 1981), is similarly suspect. Respondents quote the court's generalized statement that "First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." *Id.* at 185, *quoted in* Opp. 19. But respondents ignore the court's actual *holding* that the district court "*must allow* the plaintiffs to proceed under fictitious names" in this particular case. 653 F.2d at 181 (emphasis added).

We come then to respondents' litany of cases, some of them similar to this one, in which the plaintiffs sued in their own names. *See* Opp. 19-21.[2] This litany proves very little. In the first place, as Judge Reinhardt aptly observed when the panel cited the same cases (*see* Pet. App. 93a-95a nn.1-3), "only two . . . involved minor litigants bringing suit in the post-1970s era, when courts have liberally allowed litigants to use Doe status." Pet. App. 89a n.11. Moreover, the fact that plaintiffs in *most* civil rights cases, even *most* challenges to racial preferences for Native Hawaiians, have used their own names cannot logically establish a categorical practice against the use of pseudonyms.

To the contrary, the numerous cases recited in the petition (*see* Pet. 17-19 & n.6), together with the cases helpfully added by respondents (*see supra* pp. 3-4 & n.1),

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[2] Among other cases, respondents point to *Brown v. Board of Education*, 347 U.S. 483 (1954), and [*James*] *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962). *See* Opp. 20. One might think respondents would hesitate to invoke the history of school desegregation as a ground for reassuring the Court that petitioners could not possibly face "any reprisal, retaliation or other harm." Opp. 21. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 13 (1958) (recounting and accepting the district court's findings that "the past year at [Little Rock] Central High School had been attended by conditions of 'chaos, bedlam and turmoil'"; and that "there were 'repeated incidents of more or less serious violence directed against the Negro students and their property'"); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 140 (1967) (citing "an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University").

show that federal courts (including this Court) simply do *not* treat "openness" as a *paramount* consideration against permitting pseudonyms. Instead, "the accepted and usual course of judicial proceedings" is to permit pseudonyms in those (admittedly rare) cases in which they are warranted by the case-specific facts.

B. Federal Rule 5.2(a)

The petition argues that if "the Ninth Circuit overvalued 'open courts' in the pseudonym calculus," it also "undervalued the child-protective policies embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 20. Accordingly, "even if there is a 'strong general presumption that plaintiffs will conduct litigation under their own names,' Rule 5.2(a) *reverses* that presumption in cases where the plaintiffs are minors." *Id.* (quoting Pet. App. 13a). Respondents have no good answer to this argument.[3]

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[3] Respondents half-heartedly seek to preclude consideration of Rule 5.2(a) on the authority of *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977), *cited in* Opp. 22. *Lovasco* said that, "[a]bsent exceptional circumstances, [the Court] will not review" an argument that "was not raised in the District Court or in the Court of Appeals." *Ibid.* More recently, however, the Court has repeatedly made clear that its practice "permit[s] review of an issue not pressed [below] so long as it has been passed upon." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) (quoting *Lebron v. National Passenger Railroad Corp.*, 513 U.S. 374, 379 (1995), in turn quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). Notwithstanding respondents' protestation to the contrary (*see* Opp. 22), the Ninth Circuit panel doubtless "passed upon" Rule 5.2(a) by construing the rule and by expressly concluding that the panel's affirmance of the district court was consistent with the rule. *See* Pet. App. 91a-92a; *see also* Opp. 12 (cataloguing the panel's extensive treatment of the rule).

After giving Federal Rule 10(a) the broadest possible reading, respondents then give Federal Rule 5.2(a) the most crabbed possible reading. In accord with the court below, respondents use the fact that the rule "may be overridden in a court's discretion" and applies "only to those documents that are filed with the court" (Opp. 23) as an excuse to render the rule a nullity in the context of protecting the anonymity of minors in federal litigation. *See id.* (arguing that Rule 5.2(a) was not "intended to supplant, *or even affect*, the existing body of law regarding plaintiff anonymity" (emphasis added)). This construction of the rule does no justice to either the Act of Congress or the Judicial Conference policy from which the rule derives. If the general "privacy and security concerns" of the statute or the specific minor-protecting aspect of the policy (*see* Pet. 21-22) are to have concrete effect, Rule 5.2(a) must do no less than what Chief Judge Kozinski says it does: "safeguard the identities of minor children" in litigation in federal court. Pet. App. 69a.

To observe that "[t]he rule is not mandatory" in all circumstances (Opp. 23) does not meet the point. Petitioners do not contend that Rule 5.2(a) alone mandated that they be permitted to use pseudonyms. They contend instead that the rule necessarily erases (in cases brought by minors) the "presumption against anonymity" (Pet. App. 98a) applied by the Ninth Circuit panel. In applying that presumption in the teeth of Rule 5.2(a), the panel departed from sound judicial practice.

Moreover, respondents have no response to the point that "'[o]nce a federal claim is properly presented, a party can make any argument [in this Court] in support of that claim; parties are not limited to the precise arguments they made below.' Thus, petitioners may argue from Rule 5.2(a) even though they did not make that argument below." Pet. 20-21 n.7 (quoting *Citizens United*, 130 S. Ct. at 892).

III. The Factual Circumstances Are Indeed Compelling.

The petition argues that "compelling factual circumstances warrant review," for "[o]nce the Ninth Circuit's erroneous 'presumption against anonymity' as well as its unjustified elevation of 'open courts' are rightly set aside, there is literally *no credible basis* for denying petitioners the use of pseudonyms in this case." Pet. 25. Before addressing respondents' four challenges to this general proposition, it is worth highlighting three discrete points that respondents do *not* challenge.

One, respondents do not contest that "[a]part from open courts, all of the public interest considerations identified by the court of appeals favored *petitioners*." Pet. 25 (citing Pet. 9). Two, respondents do not deny that they would effectively suffer *no* prejudice were petitioners permitted to use pseudonyms. *See id.* Three, respondents do not deny that "no court is likely to have an opportunity to address the legality of respondents' racially exclusionary admissions policy"—an "important [issue] in its own right"—if children "who would challenge that policy are forced to run the gauntlet of public harassment and retaliation entailed by the decision below." *Id.*

This brings us to respondents' four points.

First, respondents argue that petitioners "misstate the record" with respect to whether that record reveals " 'undoubtedly severe' threats of physical retaliation." Opp. 25. But after describing the threats on which petitioners based their motion for leave to use pseudonyms, the panel stated: "These threats of physical retaliation are undoubtedly severe." Pet. App. 14a; *see also id.* at 70a-71a (Reinhardt, J., joined by Kozinski, C.J.) ("The minor litigants, whose names had not yet been disclosed,

were subjected to what even the panel terms 'threats of physical retaliation [that were] undoubtedly severe.'"). Moreover, regardless of whether there was any formal "finding" in this regard (Opp. 25), the threats documented in the petition—recall "kill haole day everyday," "break . . . every bone," "baseball bats or guns," "violent crimes with racial overtones," "stringing up those scum lawyers," "get the lickins' you deserve," and "beat the crap out of you," Pet. 5-8—*are* undoubtedly severe.

Second, respondents chastise petitioners for assertedly "deem[ing] every anonymous and fleeting Internet comment a real and serious threat," while "ignoring the contrary factual findings made by the magistrate judge and the district judge sitting in Honolulu." Opp. 25. In fact, the petition did not ignore those "findings"; it duly reported the court of appeal's ruling that the "district court did not abuse its discretion in concluding that the Doe children's fears of severe harm are not reasonable." Pet. 10 (quoting Pet. App. 14a). But if not already made clear, petitioners respectfully submit that such findings are *clearly erroneous*. *Cf.* Appellants' Opening Brief 24 (filed June 22, 2009) (arguing that the "ruling that *none* of [petitioners'] evidence is probative of a severe threat of harm or a reasonable fear of harm was a clearly erroneous assessment of the evidence" (internal quotation marks and citation omitted)).

But in any event, petitioners' argument for employing pseudonyms is hardly grounded on "anonymous and fleeting Internet comment[s]." As petitioners attempted to explain to the lower courts, comments that might be dismissed as mere "overheated hyperbole and nonsensical venting" (Opp. 25) when made in isolation, took on an ominous character when made in a context that "includes random acts of racial violence against non-Native

Hawaiian children . . . amplified by calls for 'kill haole day everyday,' when a non-Native was recently admitted to Kamehameha." Pet. App. 16a. The hypothesized fact that "the magistrate judge and the district judge . . . are closest to the Hawaiian community" (Opp. 25) does not excuse their error in failing to perceive this point.

Third, respondents would discount what the panel of appeals called "violent crimes with racial overtones committed by Native Hawaiians against non-Natives." Pet. App. 7a.[4] In some of these crimes, the court accurately observed, "young children severely injured their non-Native classmates, calling the victims derogatory names related to their skin color, especially 'f—— haole.'" *Id.*; *see also* 2 E.R. 225, 234-35 (documenting dislocated jaw, black eye, and head gash suffered by young girls). Respondents would have petitioners take solace in the fact that there were "only four" such racially-tinged attacks in recent years and that none of the attacks "had the slightest connection to [Kamehameha Schools], its admissions policy, or this litigation." Opp. 26. But when petitioners are the victims in what respondents dismiss as mere "school yard altercations" (*id.*), will these fine distinctions be a comfort to their parents?

Ultimately, respondents argue (and the lower courts concurred) that reasonable parents would have ignored the reported race-based crimes against schoolchildren

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[4] Respondents would blind the Court's eyes to these violent crimes with racial overtones on the ground that the record evidence thereof is "inadmissible hearsay." Opp. 26. Petitioners rebutted that evidentiary objection in the district court, *see* Plaintiffs' Reply Memorandum of Law 7 n.5 (filed Oct. 13, 2008), and no judge ever sustained that objection. Indeed, respondents' answering brief in the court of appeals did not even mention the point.

as "apocryphal stories" or "urban myth." *Id.* Chief Judge Kozinski—in admitting that "[i]f threats like that were made against me or my family, I'd be worried," and "I'd call the U.S. Marshals" (Pet. App. 67a)—holds the far more sensible view.

Last, respondents argue that "this case is not a candidate for summary reversal." Opp. 26. Petitioners are indifferent to whether the Court's consideration is summary or plenary. On the one hand, summary reversal is appropriate because the Ninth Circuit did indeed commit "clear error," Opp. 27 (quoting *CSX Transportation, Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009)), and that court's error is indeed "obvious," *id.* (quoting *Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006)). On the other hand, full briefing and argument would afford the Court the opportunity to give sustained attention to an issue that it has not expressly addressed in many, many years, if ever. In either event, review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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